Supreme Court, U.S.
FILED
JUN 30 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1977

In the Supreme Court of the United States

OCTOBER TERM, 1988

IN RE:

THE BIBLE SPEAKS,
DEBTOR,

THE BIBLE SPEAKS, INC.,
PETITIONER,

v.

ELIZABETH DOVYDENAS,
RESPONDENT.

OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Blanchard Press, Inc., Boston, Mass.—Law Printers (617) 426-6690

I

QUESTIONS PRESENTED FOR REVIEW

1. Whether the United States Court of Appeals for the First Circuit, the United States District Court and the United States Bankruptcy Court were correct in concluding that the Free Exercise Clause of the First Amendment is not involved in a claim of undue influence brought by a former parishioner against a church where liability is based solely on statements and conduct which the church admitted were not part of its religious beliefs or tenets?

2. Whether the United States Court of Appeals for the First Circuit, the United States District Court and the United States Bankruptcy Court were correct in concluding that the Free Exercise Clause does not require any special or heightened burden of proof, proof of causation, or standard of review in a claim for undue influence brought by a former parishioner against a church where liability is based solely on statements and conduct which the church admitted were not part of its religious beliefs or tenets?

II

PARTIES TO THE PROCEEDING

All of the parties are listed in the caption.

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OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

Respondent, Elizabeth Dovydenas, hereby opposes the petition of The Bible Speaks, Inc. ("TBS") for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Opinions Below

The respondent adopts the petitioner's text setting forth the opinions below.

Jurisdiction

The respondent adopts the petitioner's jurisdictional statement.

Respondent's Statement of the Case

Two misleading omissions from the petition for a writ of certiorari demonstrate why this unique case raises no federal constitutional issues and carries little precedential value.

A. *Petitioner Admitted At Trial That The Statements Attributed To It Did Not Reflect Its Religious Beliefs.*

First, the petition fails to disclose TBS' admission at trial that the statements and conduct on which respondent relied to establish undue influence were not part of TBS' religious beliefs. The Opinion and Order of the bankruptcy court devoted substantial discussion to TBS' admissions, which render this case *sui generis* and which deprive it of any significant issue of federal constitutional law. (Appendix ("App.") C, pp. 120a-123a). Sitting as the trier of fact, the bankruptcy court made the following findings with respect to the challenged statements that TBS' founder and leader, Carl Stevens, had made to the respondent:

> It is abundantly clear from the evidence offered by the Church itself that these statements do not represent Church doctrines or practices. Nor does the Church even contend otherwise. To the contrary, we have the testimony of Stevens and Pastor John Leonard, President of the Stevens School of the Bible, both of whom were examined specifically concerning these statements. Both denied that Stevens' statements represent Church doctrines, beliefs or practices.

(App. C, pp. 121a-122a).

Similarly, the district court, "having reviewed the entire record" (App. B, p. 48a), held that, "[a]ccording to Stevens' own testimony, these statements were not reflective of Stevens' religious beliefs," and that "[a]ppellant's attempts to invoke

the protection of the first amendment are, hence, based on a series of false premises." (App. B, pp. 71a-72a). The court continued:

> [I]t is important to point out that the statements Stevens made, which the bankruptcy court relied on in finding undue influence, are not religious beliefs or tenets of either Stevens or TBS, according to appellant's own admissions based on the testimony before the bankruptcy court. Trial Transcripts ("T. Tr.") 6B and 12.
>
> By identifying statements made by Stevens, which do not express religious beliefs or tenets of TBS, this Court is not engaging in its own review of TBS's theology. Rather, it is relying on the statements of Stevens and of John Leonard, the director of the Stevens Bible College, regarding their own theology.

(App. B, pp. 72a-73a).

It was these findings of both lower courts, grounded in petitioner's evidentiary admissions, which formed the basis for the court of appeals' holding that this case does not rise to a constitutional level.

B. *All Three Courts Below Found "But For" Causation.*

Contrary to petitioner's argument, based on one paragraph of the court of appeals' opinion taken out of context, all three courts below found that TBS' exertion of undue influence, quite apart from any sincerely-held religious belief of TBS, caused Mrs. Dovydenas to give her money to it. The bankruptcy court found that Mrs. Dovydenas had "submitted to the overmastering effect" of petitioner's conduct, and ruled "that all of [her] gifts were the product of undue influence . . . ." (App. C, pp. 117a, 118a). The district court also found "that claimant Elizabeth Dovydenas' gift was motivated by undue influence on the part of the debtor," and that she had "submitted to the overmastering effect of Stevens' influence on

behalf of TBS." (App. B, pp. 64a, 71a). That court therefore upheld "the bankruptcy court's conclusion that debtor-appellant TBS exerted undue influence *which resulted in* gifts of $6,581,356.26 by the claimant appellee . . . ." (App. B, p. 83a) (emphasis added). The statements and conduct on which the courts relied in finding undue influence, by TBS' own admission, did not involve any TBS religious beliefs or tenets. The courts' conclusions that the gifts "were the product of," were "motivated by," and "resulted" from petitioner's exertion of undue influence are therefore synonymous with a conclusion that the secular acts constituting undue influence were the "cause" of the gifts.

The court of appeals also applied a "but for" standard of causation, as evidenced by the following. First, in its reversal of the lower courts' findings with respect to the $1,000,000 gift, the court concluded that the lower courts "erred in finding that this gift was the result of undue influence." (App. A, p. 39a). Second, the court then upheld the rescission of the $5,000,000 gift, holding that respondent's decision to make the gift earlier than had been planned "was determined" by four acts of undue influence, none of which involved any religious belief of TBS. (App. A, p. 40a). Third, the court "agree[d] with the lower courts that [the $500,000] gift *was the result of* undue influence." (App. A, p. 42a) (emphasis added). Finally, applying the same principle of causation to the smaller gifts totaling $80,000, the court held that "plaintiff has failed to present a solid foundation of facts from which to find undue influence *was the cause* of these gifts." (App. A, p. 43a) (emphasis added). Reviewing the court of appeals' decision as a whole, therefore, it is clear that the court, like the lower courts before it, applied a standard of "but for" causation to respondent's claims of undue influence.

In the passage on which petitioner relies for its argument that the court of appeals did not apply the correct standard of causation, the court examined separately each of four factors found to have caused the $5,000,000 gift, and concluded that

any one of those acts standing alone might have been the cause of respondent's decision to make the gift. (App. A, pp. 41a-42a). The court made clear, however, that, in any event, the four factors, taken together, were the cause in fact of the $5,000,000 gift. (App. A, pp. 41a-42a) ("These facts lead inexorably to a finding of undue influence."). *See also* App. A, at pages quoted above and at p. 46a) ("The five million dollar gift and the half million dollar gift . . . were both nurtured and brought to fruition by misstatements and distortions of facts . . . .").

Reasons the Writ Should Be Denied

I. The Decision Of The Court Of Appeals Does Not Raise Any Important Question Of Federal Law Nor Does It Present Any Other Reason For The Grant Of Certiorari.

Five judges of three federal courts have reviewed this case and unanimously concluded that petitioner's conjuring up of a First Amendment issue is illusory. Rather, the courts have agreed that this case presents nothing more than the ordinary application of state common law. TBS' testimonial admissions that the statements constituting undue influence were not among its religious beliefs forever put to rest any possible constitutional argument it could make. TBS' own testimony removed any federal law issue from this case, and all three lower courts properly decided the case on the basis of applicable state law. TBS should not be allowed to obtain review in this Court by taking a position contrary to its own trial testimony. Having itself eliminated all issues of federal law from the case, TBS cannot genuinely argue now that the case presents any issue worthy of this Court's review.

This case is *sui generis* and TBS has not shown otherwise. TBS cites no conflict with any opinion of any federal or state trial courts, let alone any court of appeals, highest state court

or opinions of this Court. Nor does TBS cite any cases at all which support the novel interpretation of the First Amendment which it urges this Court to adopt. Indeed, to the contrary, the rulings by the courts below in this case are directly supported by a recent ruling of the California Supreme Court in *Molko* v. *Holy Spirit Ass'n for the Unification of World Christianity*, 46 Cal. 3d 1092, 1114-15, 1124-25, 762 P.2d 46, 58, 64-65 (1988), *cert. denied*, 57 U.S.L.W. 3767 (May 22, 1989), review of which this Court recently denied. In *Molko*, the California Supreme Court ruled that an undue influence claim for rescission of a religiously-motivated gift could be asserted against a church without violating the First Amendment even where liability was based on statements which were central tenets of the particular faith involved. *Id.* Thus, TBS' petition should be denied because this case involves no issue of federal law that is in need of resolution by this Court.

A. *The First Amendment Is Not Involved In This Case Because The Courts' Rulings Do Not Infringe, By TBS' Own Admission, Sincerely-Held Religious Beliefs.*

All three courts below (including a unanimous panel of the court of appeals) concluded that the First Amendment does not apply to Mrs. Dovydenas' claim against TBS because the First Amendment does not provide any immunity or special privilege to religious officials for secular statements made by them for the purpose of inducing contributions. (*See* Opinion of the United States Bankruptcy Court, Appendix C, pp. 119a-131a; Opinion of the United States District Court, Appendix B, pp. 71a-81a; Opinion of the First Circuit Court of Appeals, Appendix A, pp. 43a-46a). The conclusion of these courts is correct. This case does not in any way infringe the rights of TBS to hold or pursue its religious beliefs. Neither Mrs. Dovydenas nor the courts below has challenged the religious beliefs of TBS. There has been no issue raised con-

cerning the truth or validity of any of TBS' religious beliefs. The rulings of the courts below have not attacked the practices of evangelism, religious solicitation or personal visitation of TBS nor have they limited good faith efforts of TBS to persuade parishioners to make donations or to persuade non-believers to convert to its religion. Rather, the courts below have merely limited the ability of a religious leader to extract money unfairly and unlawfully from a parishioner through a pattern of fraudulent and coercive conduct which, TBS admits, is not related to any religious belief of the organization. This redress of such unlawful conduct infringes no First Amendment rights.

This Court has made clear that the First Amendment's protections are not invoked unless the state interferes with a religious, as opposed to a secular, belief and that belief is sincerely-held. Indeed, in all First Amendment cases, the first inquiry is whether the state has interfered with a person's words or actions which are based upon a sincerely-held religious belief. If the words or actions are secular and not part of a sincerely-held religious belief, the First Amendment simply does not apply. *E.g.*, *Frazee* v. *Illinois Department of Employment Security*, 109 S. Ct. 1514, 1517 (1989); *Thomas* v. *Review Board of Indiana Employment Security Division*, 450 U.S. 707, 713 (1981); *Wisconsin* v. *Yoder*, 406 U.S. 205, 215-16 (1972); *United States* v. *Seeger*, 380 U.S. 163, 185 (1965); L. Tribe, *American Constitutional Law* § 14-12, at 1242 (2d ed. 1988). *See also Molko* v. *Holy Spirit Ass'n for the Unification of World Christianity*, 46 Cal. 3d 1092, 1114-15, 762 P.2d 46, 58 (1988), *cert. denied*, 57 U.S.L.W. 3767 (May 22, 1989).[1]

[1] If a sincerely-held religious belief is involved, government interference can still be justified provided that it serves a compelling state interest and there is no less restrictive alternative. *Bob Jones University* v. *United States*, 461 U.S. 574, 603-04 (1983); *Sherbert* v. *Verner*, 374 U.S. 398, 406-08 (1963); *Molko* v. *Holy Spirit Ass'n for the Unification of World Christianity*, 46 Cal. 3d 1092, 1112-13, 762 P.2d 46, 56-57 (1988), *cert. denied*, 57 U.S.L.W. 3767 (May 22, 1989). *See* discussion *infra* above at pp. 12-20.

In this case, the First Circuit Court of Appeals concluded that Mrs. Dovydenas' decision to make the $5,000,000 gift earlier than she had planned was caused by four factors which the court found were "secular statements and actions." (App. A, pp. 40a-41a, 45a). These four factors are: (1) the deliberate fostering by Stevens and other members of TBS of Mrs. Dovydenas' belief that her gift of $1,000,000 had cured Stevens' wife's headaches when, in fact, the headaches continued and Stevens and the other members knew it; (2) Stevens' influencing Mrs. Dovydenas not to tell her husband or family about her gifts by telling her that her husband and family were controlled by Satan, which Stevens admitted at trial was not a religious belief of TBS; (3) the deliberate misrepresentation by Stevens and his wife that a member of TBS was being held in Rumania at great danger to his life, and encouragement of Mrs. Dovydenas to give $5,000,000 to TBS to effectuate his release, when both knew that he had already been released and was in no danger; and (4) Stevens' prevailing upon Mrs. Dovydenas to write a letter falsely stating that no one from TBS had asked her to make the $5,000,000 gift or knew that she was going to make it, when both Stevens and his wife knew about the gift before it was made and accelerated its delivery. (App. A, pp. 40a-41a).

In its Petition, TBS argues that the First Amendment is involved here because each of these four factors "was understood by the parties to have a significant religious dimension." (Petition, p. 19). This is a misstatement of the evidentiary record. The first and third factors are obviously misstatements of secular facts and were not based on the religious beliefs of TBS, and the fourth factor was deceptive secular conduct which also was not based on the religious beliefs of TBS. Indeed, in its Petition, TBS does not even attempt to explain how any of these three factors had a significant religious dimension. (Petition, p. 19). Finally, the second factor, while "religious-sounding," is also not based on any religious beliefs of TBS. Stevens specifically admitted at trial that it is not part of the

religious beliefs of TBS that outsiders are controlled by Satan or that outsiders should be lied to. (App. C, pp. 121a-122a). TBS cannot now attempt to recast the import of this binding admission.[2]

Thus, as the courts below concluded, the First Amendment is not implicated in this case because the statements constituting undue influence were not part of the sincerely-held religious beliefs of Stevens or TBS. TBS urges the Court to extend the First Amendment beyond its traditional protection of only sincerely-held religious beliefs and to announce a novel rule that even in an undue influence case where the church's liability is premised exclusively on secular statements, the First Amendment requires that a special burden of proof and proof of causation be applied. TBS bases this argument on its First Amendment right to receive religiously-motivated donations. (Petition, p. 15). Specifically, TBS argues that under the First Amendment, rescission of a religiously-motivated gift should be allowed, in a claim against a church for undue influence based on admittedly secular statements, only if the parishioner can prove by clear and convincing evidence that, but for the secular misrepresentations and misdeeds, the gift would not have been made. (Petition, pp. 17-18, 25-26). As is discussed below, this contention should be rejected because it is both unprecedented and unsound. Further, this is not an appropriate

[2] Indeed, the petitioner's argument that the Court should probe behind Stevens' testimonial admissions to determine what are and are not religious beliefs of TBS invites review that is itself problematic under the First Amendment. The doctrine of ecclesiastical abstention requires a court to accept at face value the pronouncements of the highest authority of a religious institution concerning ecclesiastical matters, including the religious beliefs of the institution. *See Serbian Orthodox Diocese* v. *Milivojevich*, 426 U.S. 696 (1976); *Watson* v. *Jones*, 80 U.S. (13 Wall) 679 (1872). *See also Lyng* v. *Northwest India Cemetery Protective Association*, 485 U.S. 439, 108 S. Ct. 1319, 1329-30 (1988) (Court will not "rule that some religious adherents misunderstand their own religious beliefs"); L. Tribe, *American Constitutional Law*, § 14-11, at 1237-42 and § 14-16, at 1298 (2d ed. 1988). Here, the petitioner voices no doubt that Stevens, as the highest ecclesiastical authority of TBS, testified that the statements he made to the respondent were not religious beliefs of TBS, thereby precluding further inquiry into the matter.

case for this Court to decide whether such a special rule should be created, for it is clear that the courts below found, on the basis of clear and convincing proof, that Mrs. Dovydenas' gifts of $5,500,000 would not have been made but for the secular statements and actions of TBS constituting undue influence.

B. *Even If The First Amendment Were Implicated In This Case, There Would Be No Important Or Unclear Issue Of Federal Law Which Needs To Be Resolved.*

Even if all three lower courts were wrong in concluding that this case does not involve any sincerely-held religious beliefs of TBS, the courts' decisions are fully consistent with decisions of this Court holding that religious conduct, as opposed to religious beliefs, may constitutionally be subject to state regulation. This Court has made clear that while the freedom to believe in a religion is absolute, the freedom to act pursuant to that belief is not, and may be regulated for the protection of society. *Cantwell* v. *Connecticut*, 310 U.S. 296, 303-04 (1940). Thus, even in cases where the First Amendment is involved, this Court has held that the State may justify interference with a person's religious freedoms provided that the state interference serves a compelling state interest and there is no less restrictive alternative available. *Bob Jones University* v. *United States*, 461 U.S. 574, 603-04 (1983); *Sherbert* v. *Verner*, 374 U.S. 398, 406-08 (1963).

The First Amendment has not been violated in this case because ordering rescission of Mrs. Dovydenas' gifts on account of TBS' undue influence serves a compelling state interest which cannot be adequately protected through a less restrictive alternative. The Commonwealth of Massachusetts has an obviously fundamental interest in protecting its citizens from fraud and coercive conduct, and in ensuring that its citizens part with their assets only of their own free will. *See, e.g.*, *Bowen* v. *Roy*, 476 U.S. 693, 709 (1986) (goal of prevent-

ing fraud in social security benefits programs is compelling governmental interest sufficient to override free exercise claim); *Sherbert* v. *Verner*, 374 U.S. 398, 407 (recognizing that a least restrictive alternative analysis would be required if statute concerned state's interest in preventing fraud); *International Society for Krishna Consciousness, Inc.* v. *Barber*, 650 F.2d 430, 444-45 (2d Cir. 1981) (prevention of fraud is compelling state interest which can overcome free exercise rights); L. Tribe, *American Constitutional Law*, § 14-13, at 1273 (2d ed. 1988). *Cf. Schneider* v. *State*, 308 U.S. 147, 164 (1939) (recognizing prevention of fraud could overcome free speech rights of Jehovah's witness who was distributing religious literature without a permit); *Cantwell* v. *Connecticut*, 310 U.S. at 306 ("Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public.").

Moreover, judicial rescission of a gift in an action for undue influence is the least restrictive alternative available for promoting this compelling and fundamental interest. Significantly, TBS cites no decision invalidating a judicial order or rescission based on an equitable doctrine designed to protect a compelling state interest such as the interest in preventing undue influence.[3] The typical free exercise case involves a state or local statute, regulation or ordinance which either involves impermissible prior restraints on potentially protected activities or, at the least, involves laws determined to be overbroad and not narrowly crafted to avoid governmental intrusion into constitutionally-protected conduct. *E.g.*, *Cantwell* v. *Connecticut*, 310 U.S. 296, 307 (1940); *Murdock* v. *Pennsylvania*, 319 U.S. 105, 114 (1943); *Schneider* v. *State*, 308 U.S.

[3] The only case on point in fact concludes that liability for undue influence may be imposed against a church without violating the First Amendment even where the sole basis of liability is statements by church members which were found to be sincerely-held and central tenets of the particular faith involved. *Molko* v. *Holy Spirit Ass'n for the Unification of World Christianity*, 46 Cal. 3d 1092, 1114-15, 1124-25, 762 P.2d 46, 58, 64-65 (1988), *cert. denied*, 57 U.S.L.W. 3767 (May 22, 1989).

147 (1939); *Village of Schaumburg* v. *Citizens for a Better Environment*, 444 U.S. 620 (1980). In many of these cases, while this Court has struck down prior restraints or overly broad laws, it has reasoned that after-the-fact judicial enforcement of a law punishing fraud would be constitutionally permissible in the face of claims of free exercise or free speech rights. *E.g.*, *Schneider*, 308 U.S. at 164; *Village of Schaumburg*, 444 U.S. at 637. *See also Riley* v. *National Federation of the Blind of North Carolina, Inc.*, 56 U.S.L.W. 4869, 4873 (June 29, 1988) ("In striking down this portion of the Act, we do not suggest that states must sit idly by and allow their citizens to be defrauded. North Carolina has an anti-fraud law, and we presume that law enforcement officers are ready and able to enforce it."); *International Society for Krishna Consciousness, Inc.* v. *Barber*, 650 F.2d at 446 ("resort to the penal laws, which punish undesirable conduct after it occurs, is a more appropriate response to . . . misconduct than a sweeping prohibition on all solicitation, fraudulent and nonfraudulent").

Thus, this Court has recognized that after-the-fact judicial enforcement of laws aimed directly at fraudulent conduct provides a "least restrictive alternative" sufficient to overcome First Amendment challenge. Judicial enforcement of the doctrine of undue influence against a religious institution therefore does not violate the right to the free exercise of religion.

Indeed, actions for rescission of gifts on the grounds of undue influence are peculiarly inoffensive to free exercise rights. Unlike tort actions where plaintiffs seek compensatory or, especially, punitive damages, an undue influence action results only in rescission of a transaction, restoring the parties to the *status quo ante*. Neither is it designed to, nor has it the effect of, punishing unlawful conduct; it merely undoes a transaction which the law, for reasons of fairness, treats as voidable. *See supra* pp. 45-46. There is no danger of a "chilling effect" comparable to that present in a defamation case, where damages may be unlimited, or an obscenity case where

criminal sanctions may be imposed. In short, the remedy of rescission in an undue influence case imposes the smallest burden possible on arguably protected conduct while promoting the state's compelling interest in preventing fraud and coercion.

Further, far from representing an "unstructured" cause of action, as TBS has argued (Petition, p. 16), the claim of undue influence is a highly-focused one. The legal standards for undue influence, which the lower courts applied, are clearly defined and unambiguous. The following elements must be shown: (1) a person who is susceptible to influence; (2) the fact of deception practiced or improper influence exerted; and (3) submission to the overmastering effect of such unlawful conduct. *Miles* v. *Caples*, 362 Mass. 107, 112, 284 N.E.2d 231 (1972). In addition, the courts below applied the rule that there must be a solid foundation of established facts to support an inference of undue influence. (App. A, pp. 37a, 42a). *See Neill* v. *Brackett*, 234 Mass. 367, 370, 126 N.E. 93, 94 (1920). There was nothing "unstructured" about the courts' findings that Stevens lied to Mrs. Dovydenas and improperly influenced her to give money to TBS, and that she submitted to the overmastering effect of his conduct. The detailed factual findings of all three lower courts, and their careful application of these clear legal standards, represent precisely the type of narrow, confined and fact-specific inquiry which eliminates any perceived threat or burden to religion.

Accordingly, TBS' liability for undue influence in this case should be upheld because it serves a compelling state interest that cannot be satisfied through a less-restrictive alternative. This Court should reject TBS' attempt to interpret the First Amendment as requiring a special standard of causation or burden of proof in undue influence cases involving religiously-motivated gifts because such a standard is both unsound and unprecedented. TBS does not, and cannot, cite any authority for this special standard of causation or burden of proof in undue influence claims against the clergy. To the contrary,

courts have applied the same standards of causation and burden of proof to claims against religious institutions as they have to claims against others. *See, e.g., Molko* v. *Holy Spirit Ass'n for the Unification of World Christianity*, 46 Cal. 3d 1092, 1124-25, 762 P.2d 46, 64-65 (1988), *cert. denied*, 57 U.S.L.W. 3767 (May 22, 1989); *Nelson* v. *Dodge*, 76 R.I. 1, 68 A.2d 51 (1949); cases cited in Annotation, *Undue Influence in Nontestamentary Gifts to Clergyman, Spiritual Advisor or Church*, 14 A.L.R.2d 649 (1949). *Cf. SEC* v. *World Radio Mission, Inc.*, 544 F.2d 535, 537 n. 3, 539 and n. 7 (1st Cir. 1976) (in action against church for violation of the federal securities laws in sale of securities by church, court concluded that fact that investors had religious motives was "irrelevant" and did not require special proof that but for the fraudulent secular statements, religiously-motivated investments would not have been made).[4] Indeed, in *Molko*, the Supreme Court of California held that a church could be liable under traditional undue influence standards even where the statements constituting the undue influence were found to be sincerely-held and central tenets of the particular faith involved. *Molko*, 762 P.2d at 58, 64-65. This case presents an even more compelling circumstance for applying the traditional standards than did *Molko* because liability is premised exclusively on secular statements and actions.

Furthermore, the state's legitimate interest in ensuring that its citizens part with their assets only of their own free will would be substantially undermined by any heightened causa-

[4] Respondent notes that the standard for causation in undue influence claims has not been specifically described by the Massachusetts courts. In any event, it should be no more stringent than that applied in analogous common law fraud claims. *See Restatement (Second) of Torts* § 546 and Comment(b) (1964) (plaintiff in fraud claim is not required to establish that the misrepresentation was the exclusive or even the predominant factor in determining a person's conduct, but need only show that the misrepresentation was a substantial factor in influencing her decision). Similarly, while the burden of proof has not been specifically addressed, it appears that the preponderance of evidence standard governs provided that there is a solid foundation of established facts. *Neill* v. *Brackett*, 234 Mass. at 370, 126 N.E. at 94.

tion standards or burden of proof in undue influence cases for rescission of religiously-motivated gifts. The state is legitimately entitled to prevent the clergy, as well as all other persons, from exercising fraud or coercion to obtain donations, gifts or transfers of property. Claims for undue influence, as traditionally applied by the courts, can be very difficult to prove because plaintiffs are often unable to present direct evidence of any exertion of undue influence and are forced to rely instead on inferences based on such meager circumstantial evidence as the donor's age, the donor's relationship to the donee and the fact of the gift. *E.g.*, *Miles* v. *Caples*, 362 Mass. 107, 112, 284 N.E.2d 231, 235 (1972); *Heinrich* v. *Silvernail*, 23 Mass. App. Ct. 218, 229, 500 N.E.2d 835, 843 (1986). If heightened burdens of proof or standards of causation were required, the state's ability to prevent undue influence could be substantially undermined. Moreover, balancing the state's interest against the church's interest, it is clear that application of the traditional undue influence standards will not impose any undue burden on the ability of religious institutions to solicit and receive donations. Indeed, the fact that the traditional standards have been applied for decades in cases against the clergy without controversy demonstrates that they impose no undue burden and create no chilling effect.

Finally, creating a special standard of causation or burden of proof in undue influence claims against the clergy would constitute a special preference for the clergy violative of the First Amendment's Establishment Clause. It would, in effect, create a special privilege for the clergy to exercise fraud, moral coercion and perhaps even physical coercion to extract money from its religiously-motivated parishioners. While the government may sometimes relieve the clergy from governmentally-imposed burdens on religious grounds, it is not entitled, in the name of religion, to confer special benefits on religious institutions. *E.g.*, *Committee for Public Education and Religious Liberty* v. *Nyquist*, 413 U.S. 756 (1973).

II. There Is No Need To Reach TBS' Arguments That This Court Should Require Special Causation And Burden Of Proof Standards In Undue Influence Claims Against The Clergy Because Those Standards Were Met In This Case.

This Court need not address whether a heightened burden of proof or proof of causation is required because, in this case, a review of the facts and the rulings of each of the lower courts reveals beyond doubt that Mrs. Dovydenas proved by clear and convincing evidence that her gifts would not have occurred but for the undue influence by TBS. First, with regard to causation, each of the courts below applied a "but for" standard. The bankruptcy court expressly found that Mrs. Dovydenas "was a marionnette at the end of a number of strings manipulated by Stevens," that Stevens had "complete ascendancy" over her, that she "submitted to the overmastering effect of this influence," and that "[her] gifts were the product of undue influence exercised upon her by the church through Stevens." (App. C, pp. 117a-118a). Similarly, the district court found "that claimant Elizabeth Dovydenas' gift was motivated by undue influence on the part of [TBS]" and that Mrs. Dovydenas had "submitted to the overmastering effect of Stevens' influence on behalf of TBS." (App. B, pp. 64a, 71a). The district court thereafter upheld "the bankruptcy court's conclusion that debtor-appellant TBS exerted undue influence *which resulted in* gifts of $6,581,356.26 by [Mrs. Dovydenas] . . . ." (App. B, p. 830) (emphasis added).

The court of appeals also applied a "but for" standard of causation. This is evidenced by its findings with respect to all gifts: (1) with regard to the $1,000,000 gift the court found that "[the lower courts] erred in finding that this gift was the result of undue influence"; (2) with regard to the $5,000,000 gift, the court held that Mrs. Dovydenas' decision to make that gift earlier than had been planned "was determined" by four secular acts of undue influence; (3) with regard to the

$500,000 gift, the court found that "[this] gift was the result of undue influence"; and (4) with regard to smaller gifts totalling $80,000, the court held that Mrs. Dovydenas "has failed to present a solid foundation of facts from which to find undue influence *was the cause of* these gifts." (App. A, pp. 39a, 40a, 42a, 43a) (emphasis added). Thus, reviewing the Court of Appeals' decision as a whole, it is clear that this Court, like the lower courts before it, applied a standard of "but for" causation to respondent's claims of undue influence.

The language in the court of appeals' opinion relied upon by TBS also supports this conclusion. (Petition, pp. 10, 18; App. A, pp. 41a-42a). In that passage, the court of appeals was examining separately the potential effect of each action of undue influence and concluded that each, standing alone, may have caused the gift. (App. A, pp. 41a-42a). The court also made clear, however, that all four factors, viewed together, certainly caused the gift to be made. (App. A, pp. 41a-42a) *(see also* App. A, p. 46a).[5]

[5] With regard to the $5,000,000 gift, the court of appeals suggested that TBS' undue influence both (1) caused the gift to be made earlier than originally planned (App. A, pp. 40a, 41a) and (2) caused the gift to be made at all. (App. A, pp. 41a, 46a). Whether TBS' undue influence caused a gift to be made at all or caused a gift planned for some time in the future to be made immediately is irrelevant to Mrs. Dovydenas' right to rescission. In either event, she is entitled to rescission if it was the undue influence which caused the money to be transferred at the time that it actually was transferred to TBS. Further, the court of appeals made clear that TBS' undue influence had already begun before Mrs. Dovydenas decided to make a second gift of $5,000,000, and that her decision to make that gift was tainted by that undue influence. *(See* App. A, pp. 15a, 17a). ("After the [first gift of] $1,000,000, Stevens, [Stevens' wife] and another church member each told plaintiff that [Stevens' wife's] headaches were cured because of the gift. In fact, [Stevens' wife] continued to suffer from migraines, but this was kept from plaintiff. Because she had been told by Stevens, [Stevens' wife and the other church member] that [Stevens' wife's] headaches had been cured, [Mrs. Dovydenas] believed that large gifts by her to TBS could effect events on earth . . . . In March, 1985, plaintiff told Stevens that she had heard God tell her to give $5,000,000 to TBS in June."); (App. A, p. 41a) ("If plaintiff had been told that [Stevens' wife's] headaches had not been cured by her first gift of $1,000,000, she may not have made the second gift [of $5,000,000] at

Finally, the opinions of the lower courts also reveal that they required "clear and convincing" proof that the undue influence caused the gift. The court of appeals concluded that the facts lead "inexorably" to a finding of undue influence and that there was "solid foundation of evidentiary facts" on which to base liability. (App. A, pp. 41a-42a). Similarly, the bankruptcy court emphasized that there was "ample evidence of undue influence" and that the evidence clearly revealed that Mrs. Dovydenas was "a marionette at the end of a number of strings manipulated by Stevens." (App. C. pp. 108a, 117a).

In sum, in this case, the lower courts' imposition of liability does not raise any First Amendment concerns because their findings of liability were premised on admittedly secular acts and statements. Further, the lower courts applied the "but for" standard of causation and their findings of undue influence are supported by clear and convincing evidence. Accordingly, in the circumstances of this case, it is clear that even if First Amendment rights are involved, imposing liability on TBS serves a compelling state interest which cannot be adequately redressed by any less restrictive alternative.

III. This Is Not An Appropriate Case For The Court To Address Whether The *De Novo* Standard Of Review Of *Bose Corporation* v. *Consumers Union Of United States, Inc.*, 466 U.S. 485 (1984) Applies To Free Exercise Cases.

In *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984), this Court concluded that determinations of "actual malice" in public figure defamation cases

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all."); (App. A, p. 46a) ("The five-million dollar gift and the half-million dollar gift might have had their seeds in the religious beliefs of plaintiff, but they were both nurtured and brought to fruition by misstatements and distortions of facts that had no basis either in the religious tenets of TBS or the plaintiff's religious beliefs.").

are subject to *de novo* review on the issue whether "actual malice" had been shown. TBS has relied upon *Bose* to argue that the Bankruptcy Court's findings should be subject to *de novo* review because this is a case involving the free exercise clause of the First Amendment. (Petition, p. 23). As the court of appeals reasoned, however, the applicability of *Bose* need not be reached because this case does not involve TBS' First Amendment rights. *(See* App. A, p. 8a).

Moreover, even if the First Amendment were involved in this case, TBS' argument that this case is governed by the standard of review set forth in *Bose* need not and should not be addressed by this Court for several reasons. First, as reasoned by the district court in this case, assuming *arguendo* that *Bose* applies to free exercise cases, *Bose* does not require *de novo* review of the credibility of witnesses. (App. B, pp. 61a-63a). *See Bose* 466 U.S. at 498-501. In this case, findings on credibility were critical to the resolution of Mrs. Dovydenas' claims.

Second, the petitioner's claim that *Bose* applies to issues involving the free exercise of religion is not supported by prior free exercise and establishment clause cases of this Court. *Thomas* v. *Review Board of the Indiana Employment Security Division*, 450 U.S. 707, 716 (1981) and *Lynch* v. *Donnelly*, 465 U.S. 668, 681 (1984). In fact, prior cases indicate that *de novo* review is improper and that the governing standard is the clearly erroneous standard. *Id.*

Third, there is no "constitutional fact" similar to the finding of "actual malice" at issue in *Bose* to which the *de novo* standard of review should be applied.[6] Fourth, both the district court and the court of appeals engaged in a careful review of the entire record. *(See* App. A, p. 7a; App. B, p. 63a). Thus, three courts have now agreed, after reviewing the entire record, that the petitioner obtained $5,500,000 in gifts from the respondent as a result of undue influence. In these circum-

[6] Indeed, the only arguable constitutional fact is whether the statements constituting undue influence were part of the religious beliefs of TBS, and, as noted above, Stevens admitted at trial that they were not.

stances, a *de novo* review is not necessary and certainly would not result in a different conclusion. *Cf. Rogers* v. *Lodge*, 458 U.S. 613, 623 (1982) (where two courts are in agreement on factual findings, the standard of review in a third court is particularly narrow.).

Conclusion

For the reasons set forth above, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Dated: June 30, 1989